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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

J. GREENEBAUM TANNING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari
To The
United States Circuit Court of Appeals
for the Seventh Circuit

Reply Brief of Petitioner J. Greenebaum Tanning Company.

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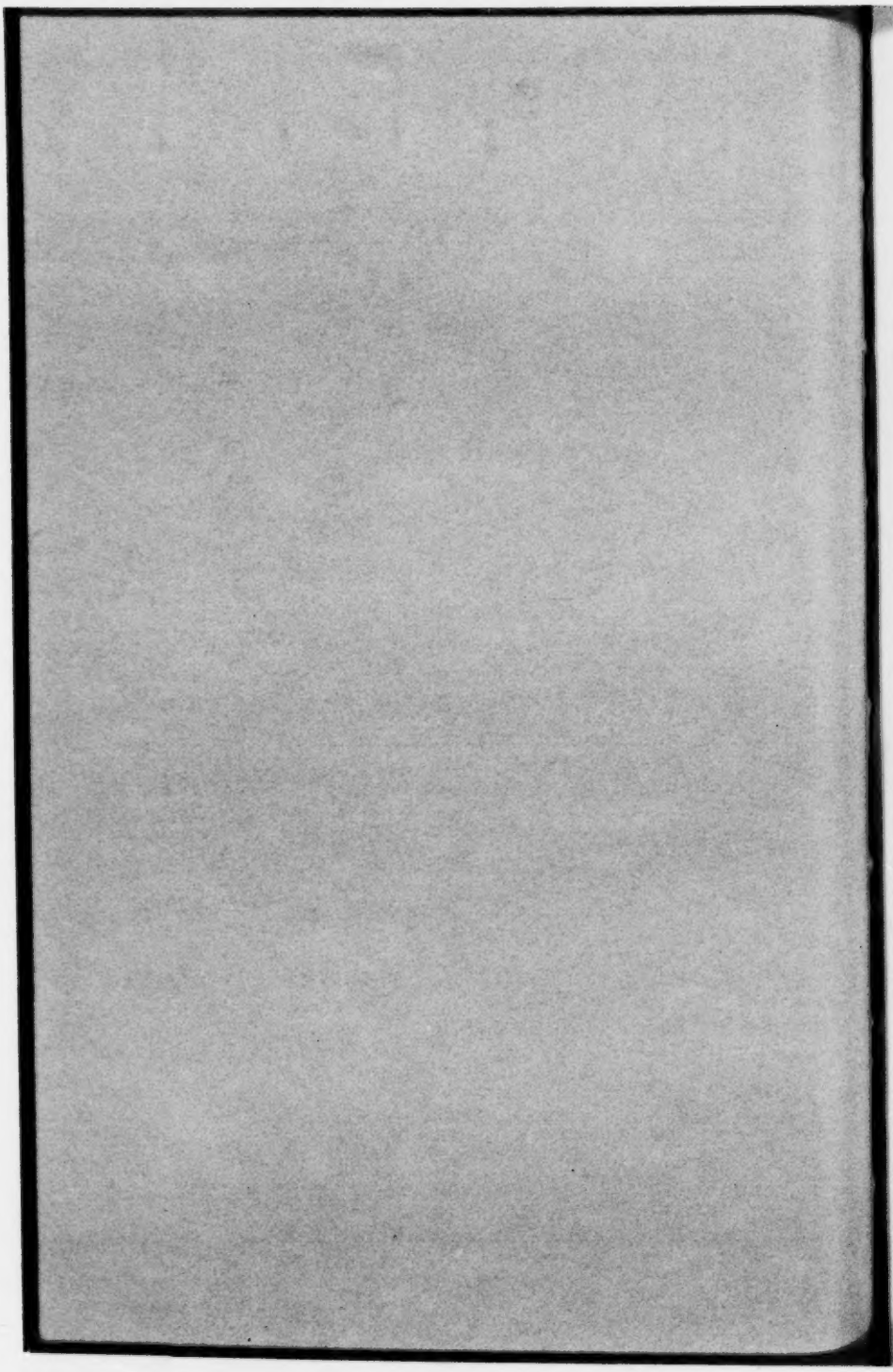

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National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V. Sec. 151, *et seq.):*

Sec. 10 (c) 4

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The Board has taken the position that petitioner cannot challenge the validity of the reinstatement order, the back pay order, and the order requiring it to reimburse work-relief projects for payments made to the discharged men for services performed on such projects, on the ground that petitioner did not challenge their validity until after the court below had entered its "Judgment." It is the lim-

ited purpose of this brief to answer this contention. Contentions of the Board in respect to the other questions raised by petitioner are not here considered for the reason that, in our opinion, they either have been adequately covered and fully met in our Petition or need no reply.

Said orders were challenged and duly objected to before the Board and the court below.

The first notice or intimation had by petitioner of the character of the order which the Board might enter against it was contained in the Recommendations of the Trial Examiner in his Intermediate Report (R. 565-573).

In said Intermediate Report, the Trial Examiner recommended, among other things, that petitioner be required to:

> "Reinstate Andrew Zych, Cyril Wojdyla and John Froelich to their former positions, or substantially similar positions, in the plants of the respondent, without prejudice to their seniority or other rights and privileges;
>
> "Make whole the said Andrew Zych, Cyril Wojdyla and John Froelich for any loss of pay they may have suffered by reason of their discharge from employment on May 28, 1937, by payment to them of a sum of money equal to that which they would have normally earned as wages during the period from May 28, 1937, to the date of such offer of reinstatement, less any amounts earned by them during such period" (R. 572).[1]

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[1] The Trial Examiner made no recommendation that petitioner be required to reimburse work-relief projects for money paid by them to these three men for services rendered to said work-relief projects. Said requirement was included in the order of the Board entered on February 15, 1939, despite the fact that petitioner had no advance notice that the Board intended to go beyond the Trial Examiner's recommendations (R. 571-572, 610).

In accordance with the Rules and Regulations of the Board, petitioner, on June 13, 1938, duly filed its Exceptions to the Intermediate Report of the Trial Examiner with the Board (R. 573-579), and among other things, took the following exception:

> "*Exception No. 25.* With reference to the conclusions and recommendations, all of the conclusions and recommendations are contrary to the evidence and are unfounded in law" (R. 578).

We find no rule or regulation or statutory provision requiring any further or additional action to challenge the validity of the Recommendations of the Trial Examiner, and the Board refers to none.

Despite the Exceptions filed by petitioner to the Intermediate Report of the Trial Examiner, the Board made its Decision, Findings of Fact, Conclusions and Order, and entered the same on February 15, 1939 (R. 589-611).

We find no rule or regulation or statutory provision requiring the taking of any exceptions, or the making of any objections, to the final Decision, Findings of Fact, Conclusions and Order of the Board, and the Board refers to none.

Manifestly, petitioner could not have challenged the order of the Board prior to the making and the entry thereof, and there is no statutory provision, rule or regulation of the Board requiring the taking of exceptions, or the interposition of objections, to its order after its entry.

In the final order of the Board, petitioner, in addition to being ordered to reinstate the three men with back pay, was ordered to reimburse work-relief projects for moneys expended by them for services performed by these men. No recommendation had been made by the Trial Examiner that petitioner be so ordered, and petitioner, accordingly, never had been advised that such an order was in prospect or in issue.

On June 24, 1939, the Board filed its Petition for the Enforcement of its Order of February 15, 1939, in the court below (R. 1-4), and on July 14, 1939, petitioner duly filed its Answer to said Petition for Enforcement (R. 5).

In its said Answer, petitioner alleged, among other things, that said order of the Board "was and is contrary to law, null and of no effect;" that the "actions required of respondent by said order are not ordered in accordance with the law and the facts, and the ordering of such actions is unreasonable, arbitrary and capricious;" and that the "affirmative actions required of respondent by said order are not necessary to, and will not effectuate the National Labor Relations Act, as is required of such an order by Section 10 (c) of said Act" (R. 5).

On March 22, 1940, the court below handed down its Opinion (R. 626-635), and on the same day entered the following order:

> "It is now here ordered by the Court that the order of the National Labor Relations Board entered in this cause on February 15, 1939, be affirmed, as modified by this Court in respect to reimbursements.
>
> "It is further ordered by the Court that said order, as modified, be enforced" (R. 636).

Throughout its Reply Brief and again in its Supplemental Memorandum, the Board refers to this order of March 22, 1940, as the "Judgment" of the court below.

We respectfully submit that it was not the "Judgment" of the court below, and was not considered as such by either the court, petitioner, or by the Board itself. It was, what it purported to be, merely an *order* for judgment.

That it was not considered to be, or treated as, the "Judgment" of the court is borne out by the fact that, subsequent to its entry, the Board itself submitted to the

court below its proposed form of Decree, and thereafter the court below actually entered a "Decree" on April 27, 1940 (R. 645-647).

Manifestly, if the order of March 22, 1940, was the final "Judgment" of the court, there was no necessity for the entry of the Decree on April 27th.

May we call this Court's particular attention to the fact that on April 16, 1940, *prior to the entry of the Decree*, petitioner duly filed, in the court below, its "Objections to Entry of Any Decree at This Time" and "Objections to the Entry of a Decree in the Form Proposed by the National Labor Relations Board" (R. 636-641).

In its said "Objections," it will be noted, petitioner specifically made each and every contention concerning the invalidity of the Board's order which it has raised and asserted in its Petition to this Court for writ of certiorari.

That the court below did not ignore, and did not refuse to consider, petitioner's said "Objections," as the Board would like this Court to believe, is borne out by the fact that on April 27, 1940, prior to its entering its Decree, the court below specifically entered an order overruling petitioner's said "Objections" (R. 644).

The foregoing *resumé* of the procedural steps taken, we respectfully submit, shows that there is no basis whatsoever for the Board's contention that the orders challenged by petitioner before this Court were not properly challenged by it before the Board and the court below.

The Reinstatement Order.

The Board states that there is no decision holding that "where no contention concerning subsequent employment is raised before the Board, the Board must adduce evidence and make specific findings that the men reinstated did not obtain equivalent employment" (Bd. Brief, p. 15).

From the foregoing statement, it is manifest that the Board has failed to appreciate the import of the decision of the Circuit Court of Appeals for the Fourth Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 94 F. (2d) 61, 97 F. (2d) 959, the decision of the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.*, 99 F. (2d) 533, and the decision of this Court in *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615.

The Board fails to realize or understand that it has only limited powers; that it has only such *power* as is vested in it by the National Labor Relations Act; and that by said Act it has the *power* to reinstate only "employes" as that term is defined in the Act.

This point is clearly brought out by the Circuit Court of Appeals for the Fourth Circuit in *Mooresville Cotton Mills vs. N. L. R. B.*, 97 F. (2d) 959, *supra*, at p. 961, as follows:

> "The question arises in connection with the definition of the term 'employee' set out in Section 2 (3) of the Act and the use of the same term in Section 10 (c) of the Act in describing the power conferred upon the Board to direct an employer who has engaged in unfair labor practice to take such affirmative action as will effectuate the policies of the Act. Section 2 provides that 'when used in this Act * * * the term employee * * * shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.' Section 10 (c) provides that if the Board shall be of the opinion that an employer has engaged in unfair labor practice, the Board shall order him to cease and desist therefrom, 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' Giving the

> word 'employee' the significance which Congress has said it shall have when used in the Act, it would seem to be manifest that *the power conferred upon the Board to order an offending employer to reinstate employees does not include former workmen who have obtained regular and substantially equivalent employment elsewhere''* (Italics supplied).

This point is also clearly brought out by the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, *supra,* at p. 537, as follows:

> ''It should be noted that only 'employees' may be reinstated. Section 2 (3) of the Act defines 'employee' to 'include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' Respondent makes several contentions regarding the time when the men are to be considered as employees. I think that since the Act provides that the Board may, 'order * * * reinstatement of employees with or without back pay' *before it could make such an order it would first have to determine whether or not the men were 'employees' at the time of its order. If the men were not 'employees' the Board would have no power to order their reinstatement''* (Italics supplied).

We, accordingly, respectfully submit that if, as the court stated in the *Carlisle* case, *before the Board could make a reinstatement order,* ''it would first have to determine whether or not the men were 'employees' at the time of its order,'' the Board had the positive obligation and burden of establishing the *sine qua non* of the exercise of that power, viz., *that the men were ''employees'' within the meaning of the Act at the time of its order.*

As we stated in our Petition, to support its reinstatement order, ''there had to be a finding by the Board (or

at least evidence which would have supported such finding), that subsequent to their respective discharges and up to February 15, 1939 (when the Board entered its order), Wojdyla, Zych and Froelich had not 'obtained any other regular and substantially equivalent employment' " (Pet. 32).

There was neither a finding to that effect nor evidence which would have supported such a finding if made.

In the instant case, the Board, in opposing our Petition, takes the position that it is not necessary for the Board to make a finding as to whether or not the men were "employes" at the time of its order, unless the issue "of substantially equivalent employment has been raised" (Bd. Brief, p. 16).

Not a word is said by the Board respecting the fact that, in addition to there being no finding that the men were "employees" at the time of its order, there is a total absence of any evidence on their status subsequent to the hearing, which was concluded on February 24, 1938, and prior to the entry of its order on February 15, 1939.

In this connection, the following language of this Court in *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, *supra*, at p. 47, is in point:

> "The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court."

The Board refers to the case of *N. L. R. B. vs. National Motor Bearing Co.*, 105 F. (2d) 652 as supporting its contention that an order for reinstatement need not be supported by a *specific* finding that the men have not "gained substantially equivalent employment" (Bd. Brief pp. 16-17). That case upheld and recognized the very principle we are asserting that "only those who are 'employees' within the Act definition at the time of the making of the Board's order may be ordered reinstated" (p. 662).

It held, it is true, that there need not be a *specific* finding that the men "have not gained substantially equivalent employment." In so holding, however, the court pointedly referred to the fact that the Board had actually made a finding that two of the employees involved in that case had "obtained regular and substantially equivalent employment elsewhere" and then stated:

> "This finding is tantamount to a finding that the other individuals listed had not at the date of the order obtained substantially equivalent employment" (p. 662).

No similar inference can be drawn from the findings made by the Board in the instant case. Not only was there no finding specifically, or by reasonable inference, to the effect that the three men had not "obtained any regular or substantially equivalent employment" prior to the order of the Board of February 15, 1939, but if such finding had been made or inferred it would have been supported by no evidence.[2]

The hearing before the Trial Examiner was concluded on February 24, 1938 (R. 533), and his Intermediate Report was based upon the evidence adduced up to February 24,

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[2] Cf. **Standard Lime & Stone Company vs. N. L. R. B.**, 97 F. (2d) 531 (C. C. A. 4).

1938 (R. 565). Obviously the only evidence that could have been presented, respecting whether or not the three men were still "employes" within the meaning of the Act, was evidence relating to their employment elsewhere since their discharge and *up to the hearing.* That evidence was presented (R. 75-77, 193-194, 239-241). But, as held in the *Carlisle* and *National Motor Bearing* cases, *supra,* only those who are "employes" within the meaning of the Act "at the time of the making of the Board's order" may be ordered reinstated.

In other words, in the period of almost a year between the conclusion of the hearing and the entry of the Board's order, the discharged men may "have obtained other regular and substantially equivalent employment" and, if so, would *not* have been "employes" within the meaning of the Act, at the time of the Board's order. In the absence of evidence that they had not obtained "other regular and substantially equivalent employment" during this long interim, the Board had no power to order their reinstatement. As stated by the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, *supra,* at page 537, "before it (the Board) could make such an order (for reinstatement) it would first have to determine whether or not the men were 'employees' *at the time of its order"* (Italics supplied).

The Back Pay Order.

In our Petition we stated that under the decision of the Circuit Court of Appeals for the Ninth Circuit in *N. L. R. B. vs. Carlisle Lumber Co.,* 99 F. (2d) 533, the payment of back pay cannot be ordered if reinstatement cannot be ordered (Pet. 36-38).

The Board states that no decision supports this contention (Bd. Brief. p. 17). In the very case of *N. L. R. B.*

vs. National Motor Bearing Co., 105 F. (2d) 652, referred to by the Board and relied upon by it in its Brief, the Circuit Court of Appeals for the Ninth Circuit expressly held, at p. 662, as follows:

> "We grant enforcement of the reinstatement and back pay orders as to 54 of the listed employees. These provisions of the order will not be enforced, however, as to Joseph Paul Kreig and Fred G. Turner, who have been found to have obtained substantially equivalent employment prior to the making of the order of the Board. We do not believe that we may, as urged by the Board, enforce only the back pay provision of the order as to these individuals, since the provisions as to reinstatement and back pay are, as framed, inseparable. *N. L. R. B. vs. Carlisle Lumber Co., supra,* p. 543."

The Board goes on to state that the language in the *Carlisle* case, *supra,* sustaining petitioner's contention was merely dictum (Bd. Brief 17). The court in the *National Motor Bearing Co.* case, *supra,* did not so regard it, and even if the holding was dictum in the *Carlisle* case, it was definitely involved, considered and decided against the Board in the *National Motor Bearing Co.* case.

The "Work-Relief" Order.

As we stated in our Petition, it was held in *N. L. R. B. vs. Leviton Mfg. Co.,* 111 F. (2d) 619 (C. C. A. 2d), and in *N. L. R. B. vs. Tovrea Packing Co.,* 111 F. (2d) 626 (C. C. A. 9th) that the Board had no power to order an employer to reimburse work-relief projects for moneys paid for work performed, and this Court granted certiorari in respect to this question in *Republic Steel Corp. vs. N. L. R. B.* No. 14, this Term.[3]

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[3] Since the filing of our Petition, it has been held in the following additional cases that the Board had no power to order an employer to reimburse work-relief projects for moneys paid for work performed for them;

The Board does not take issue with our contention other than to assert that the "work-relief" provision of the Board's order was not challenged below.

As we have already pointed out, the Trial Examiner made no recommendation whatsoever in his Intermediate Report that petitioner be ordered to reimburse work-relief projects for any payments made by them to the discharged men for work performed by them on said projects (pp. 2-3). Said provision was inserted by the Board in its order of February 15, 1939, without any notice whatever to the petitioner of its intention so to do.

As we have also pointed out, the validity of the order was challenged in petitioner's Answer to the Board's Petition for an Enforcement Order; and in the detailed "Objections" filed by petitioner all the contentions now asserted here were asserted before the court below prior to the entry of the Decree (pp. 4-5).

As we have also pointed out, these "Objections" were not ignored by the court below, and it entered its Decree only after it had expressly overruled the said "Objections" (p. 5). Thus, the court below, prior to the entry of its Decree, had before it all of the contentions here urged by petitioner. If those contentions were not considered on their merits by the court below, as claimed by the Board, it had the opportunity and obligation so to do.

In its Supplemental Memorandum, the Board points out that the court below, in *Stewart Die Casting Corp. vs. N. L.*

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(3) **Continued—**
Phelps Dodge Corp. vs. N. L. R. B. ..... F. (2d) ....., (C. C. A. 2d) July 11, 1940; **New York Handkerchief Manufacturing Co. vs. N. L. R. B.** ..... F. (2d) ....., (C. C. A. 7th) July 11, 1940; **Stewart Die Casting Corp. vs. N. L. R. B.** ..... F. (2d) ....., (C. C. A. 7th) July 3, 1940; **M. H. Ritzwoller vs. N. L. R. B.** ..... (F. 2d) ....., (C. C. A. 7th) decision on rehearing July 16, 1940.

R. B. (decided July 3, 1940) and in *M. H. Ritzwoller Co. vs. N. L. R. B.* (decision on rehearing July 16, 1940) considered the validity of the "work relief" provision and decided the same against the Board. The Board then asserts that this supports its contention that petitioner's "Objections" were not considered by the court upon their merits (Sup. Mem. 4).

The Board, however, apparently has overlooked the fact that only one of the Judges on the panel that decided the *Stewart Die Casting Corp.* case was on the panel which decided the instant case.[4]

The Board, likewise, has overlooked the fact that at the time that we contended that the "work-relief" provision of the Order was invalid there was no existing decision to support our contention while, on the other hand, when the question was considered in the *Stewart Die Casting Corp.* case, the court had its attention drawn to the fact that said provision had been held invalid by the Circuit Courts of Appeal in the 2d and 9th Circuits in the *Leviton Mfg. Co.* and *Tovrea Packing Co.* cases, *supra.*[5]

Significant in this connection, as showing why the court below decided as it did in the *Stewart Die Casting Corp.* case, *supra,* is the following language in that case:

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[4] The opinion in the **Stewart Die Casting Corp.** case was written by Judge Major who was not on the panel which decided the instant case, and the opinion in the instant case was written by Judge Treanor, who was not on the panel in the **Stewart Die Casting Corp.** case.

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[5] The Decree in the instant case was entered on April 27, 1940. The **Leviton Mfg. Co** and **Tovrea Packing Co.** cases were decided April 29th and April 30th, 1940, respectively.

> "On the other hand, we have a contrary holding in *Labor Board vs. Leviton Mfg. Co.* (2d Cir. not reported), decided April 29, 1940, and *Labor Board vs. Tovrea Packing Co.* (9th Cir. not reported), decided April 30, 1940. We are impressed with the reasoning employed and conclusion reached in these cases that the Board is without power to decree such a requirement."

In its Supplemental Memorandum the Board asserts that the court referred to the conflicting decisions in other circuits upon the question but did not mention its own decision in the instant case, and then asserts that the court below thus "strongly indicated" (in the *Stewart Die Casting Corp.* case) that it did not regard the decision in the instant case as an adjudication upon the question. It was only natural that the court below in its decision in the *Stewart Die Casting Corp.* case did not refer to its decision in the instant case, because nowhere in its decision in the instant case does it appear that the Board had ordered petitioner to make payments to work-relief projects.[6]

On page 3 of the Board's Supplemental Memorandum appears the text of the Court's opinion in full in the *M. H. Ritzwoller* case. Instead of supporting the Board's contention, it clearly shows that it is without merit because, as pointed out by the Court in its opinion, despite the fact that the invalidity of the provision was not argued by the employer prior to its filing a petition for rehearing, the lower court, nevertheless, in its decision on the rehearing, ordered a further modification of the Board's order to eliminate the "work-relief" provision.

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[6] See decision of the court below in the instant case reported in 110 F. (2d) 984.

Conclusion.

Wherefore it is respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for by petitioner in the Petition heretofore filed herein.

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